No. 17-1299

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY BRIEF FOR PETITIONER

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

JAMES W. BRADSHAW
PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
JAMES BARTON
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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Randall, Susan, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1 (2002) 11

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The difficulty of defending *Nevada* v. *Hall*, 440 U.S. 410 (1979), is evident from Hyatt's efforts to avoid a ruling on the question presented. He devotes pages to urging the Court to dismiss the writ of certiorari as improvidently granted, on the basis of supposed vehicle problems. But Hyatt waived those arguments by not raising them in his brief in opposition, and they are meritless.

When Hyatt finally reaches the question presented, he has no meaningful response to the FTB's brief. He claims the FTB ignores the States' interest in adjudicating disputes within their territories. But the FTB's brief recognizes that interest and explains (at 34-35) why it is outweighed by the States' interest in not being haled into other States' courts, as it was in the

Founding era. Hyatt also argues that the Framers did not intend to give interstate sovereign immunity constitutional (as opposed to common-law) protection. But he cannot account for this Court's repeated holdings that state sovereign immunity derives from the federal nature of the union established by the Constitution. Finally, Hyatt invokes *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Yet he cannot explain why *The Schooner Exchange* is relevant to interstate sovereign immunity, since the Court's holding in that case reflected the absence of a supranational tribunal that could enforce one nation's immunity against another—a defect the Constitution remedied in the interstate context by creating this Court.

Hyatt concludes by arguing that *Hall* should be preserved even if it is incorrect. But considerations favoring stare decisis are at their weakest here. *Hall*'s reasoning has been undermined by later decisions; *Hall* impairs the States' dignity and self-government interests; and *Hall* has engendered no meaningful reliance. There is every reason to overrule *Hall* and no reason to preserve it merely for the sake of consistency.

ARGUMENT

I. THERE IS NO REASON TO DISMISS THE WRIT OF CERTIORARI

Hyatt argues (at 18-28) that law of the case and waiver make this case a poor vehicle to resolve the question presented. But Hyatt waived those arguments by not raising them in his brief in opposition, and

they are meritless. And precedent forecloses amici's arguments that the Court lacks jurisdiction.[1]

A. This Court's Rule 15.2 provides that any non-jurisdictional "objection to consideration of a question presented ... may be deemed waived unless called to the Court's attention in the brief in opposition." The Court routinely enforces that rule. *See, e.g., Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 930-931 (2011); *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011). And although an issue not raised in the brief in opposition may be addressed if it is a "predicate to an intelligent resolution of the question presented," *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996) (internal quotation marks omitted), that is not true here: The question presented is independent of Hyatt's law-of-the-case and waiver arguments and can be decided without addressing them. Hyatt's arguments are thus "properly 'deemed waived.'" *Granite Rock Co.* v. *International Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

Furthermore, Hyatt presents no information of which the Court was unaware. The petition explained (at 24-26) that the Court's equal division in *Franchise Tax Board of California* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277 (2016), on whether *Hall* should be overruled did not create law of the case. The petition also noted (at 5)

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[1] Hyatt also presents a misleading account of the facts in an effort to dissuade the Court from resolving this case. For example, he accuses an FTB employee of anti-Semitism (at 2), but his witness for that point was a former FTB employee who had charged the FTB with wrongful termination, provided "consultant services" to Hyatt, and eventually claimed Hyatt "misrepresented" her testimony; other witnesses denied hearing the alleged anti-Semitic remarks. JA265, 268-270, 283-288, *Franchise Tax Bd. of Cal.* v. *Hyatt*, No. 14-1175 (U.S. Sept. 3, 2015).

that the FTB "had not asked for *Hall* to be overruled" in *Franchise Tax Board of California* v. *Hyatt* (*Hyatt I*), 538 U.S. 488 (2003). The Court granted review even though it was aware of both potential concerns; there is no reason to revisit those issues now. *See United States* v. *Williams*, 504 U.S. 36, 40 (1992).

B. In any event, neither contention is meritorious.

1. The Court's equal division in *Hyatt II* does not prevent the Court from reconsidering *Hall* now. Although affirmance of a lower court's final judgment by an equally divided Court is "conclusive and binding upon the parties," *United States* v. *Pink*, 315 U.S. 203, 216 (1942), that merely means the judgment has res judicata effect in subsequent litigation between the parties, *see, e.g.*, *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1869). The Court has never held that its equal division on an issue at an interlocutory stage of a case prevents it from revisiting that issue later in the same case. To the contrary, the law-of-the-case doctrine applies only "when a court decides upon a rule of law," *Arizona* v. *California*, 460 U.S. 605, 618 (1983), and an equally divided Court does *not* decide on a rule of law, *see Neil* v. *Biggers*, 409 U.S. 188, 192 (1972).

Moreover, the law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). "A court has the power to revisit prior decisions of its own ... in any circumstance[.]" *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Questions bearing on a court's authority to decide a case (like the question here) are more "likely to be reconsidered" than others, "because of their conceptual importance" and the degree to which they are "affected with a pub-

lic interest." 18B Wright et al., *Federal Practice & Procedure* § 4478.5 (2d ed. 2017 Supp.). And law of the case does not prevent a court from "depart[ing] from a prior holding" that "is clearly erroneous and would work a manifest injustice," *Arizona*, 460 U.S. at 618 n.8, including where a controlling precedent "would be decided differently under [the Court's] current" jurisprudence, *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997).

Finally, by deciding the question presented, the Court would not be upsetting *Hyatt II* in any but the most formalistic sense; it would be rendering a decision where it previously could not. That would hardly offend the finality and judicial economy considerations animating law-of-the-case doctrine.

2. Hyatt's argument that the FTB waived its challenge to *Hall* fares no better. Hyatt does not argue the FTB failed to preserve its challenge in the Nevada courts. He recognizes (at 26)—and the petition demonstrates (at 22-23)—that the FTB "asserted sovereign immunity from the outset." Rather, Hyatt faults the FTB for not asking this Court to reconsider *Hall* in *Hyatt I*. That argument fails for three reasons.

First, the FTB had good reason not to ask the Court to overrule *Hall* in *Hyatt I*. *Hall* had reserved the question whether "a different analysis or a different result" might obtain in a case involving core "sovereign responsibilities" or a "substantial threat to our constitutional system of cooperative federalism," 440 U.S. at 424 n.24, and in *Hyatt I* the FTB argued that this is exactly such a case, *see* Pet'r Br. 14-31, *Hyatt I*, No. 02-42 (U.S. Dec. 9, 2002). Only once the Court rejected that argument, *Hyatt I*, 538 U.S. at 498, did the FTB have no choice but to ask that *Hall* be overruled. It did so at the next available opportunity.

Second, no rule requires a party to present arguments to this Court in an interlocutory posture, so long as the party preserves those arguments for later review. This Court has repeatedly held that "[a] petition for writ of certiorari can expose the entire case to review." *Christianson*, 486 U.S. at 817 (citing *Panama R. Co.* v. *Napier Shipping Co.*, 166 U.S. 280, 284 (1897)); *see also, e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258-259 (1916). Hyatt's cases (at 26) are not to the contrary. They hold only that an argument not presented at the certiorari stage cannot be raised at the merits stage—exactly the rule that prevents Hyatt from raising his current vehicle concerns.

Third, even if the FTB had not diligently preserved its sovereign immunity argument, this Court has never held that sovereign immunity can be lost by a State's mere "'failure to raise the objection at the outset of the proceedings.'" *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 547 (2002). To the contrary, sovereign immunity may be raised on appeal even if not raised below. *Edelman* v. *Jordan*, 415 U.S. 651, 677-678 (1974). Hyatt argues (at 27-28) that sovereign immunity is *waivable*. But a State *waives* sovereign immunity when it "voluntarily invokes" the jurisdiction of a court in which it is allegedly immune or makes a "'clear declaration'" of intent to submit to jurisdiction, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-676 (1999), neither of which Hyatt claims the FTB did in the Nevada courts.

C. Professors Baude and Sachs offer two arguments that this Court lacks jurisdiction. Those arguments are unconvincing.

1. Amici argue (at 25) that the Court lacks statutory jurisdiction because this case involves no "title,

right, privilege, or immunity ... specially set up or claimed under the Constitution," 28 U.S.C. § 1257(a). But the FTB *has* "claimed" an "immunity" under the Constitution; it claims the Constitution renders it immune from this suit. Amici argue that a State has no constitutionally protected immunity in another State's courts, but that improperly assumes a negative answer to the question presented and conflates the jurisdictional inquiry with the merits.

In the analogous context of district courts' federal-question jurisdiction, "[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). Rather, jurisdiction lies if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id.* at 685; *see also Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 89 (1998). The same is true of § 1257, *see* 16B Wright et al., *Federal Practice & Procedure* § 4017 (3d ed.); the Court routinely addresses constitutional claims even if it rejects them on the merits. This Court therefore has statutory jurisdiction.

2. Amici also argue (at 27-34) that the Eleventh Amendment bars jurisdiction because this is a case by a citizen of one State against another State. But as amici acknowledge (at 32), that argument is foreclosed by two lines of precedent. The Court has "repeatedly" and "uniformly" held that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 26-31 & n.9 (1990). Nor does it bar a federal court from proceeding where a State has invoked the

court's jurisdiction. *Lapides* v. *Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618-619 (2002). Those were reasoned, conscious decisions—not the sort of "drive-by jurisdictional rulings" that "have no precedential effect," *Steel Co.*, 523 U.S. at 91—and the Court has declined prior invitations to overrule them, *see, e.g.*, *Lapides*, 535 U.S. at 620; *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 166 (1999). It should do so again.

II. States Are Constitutionally Immune From Suit In Each Other's Courts

On the merits, Hyatt offers no persuasive response to the FTB's arguments.

A. The *Hall* majority refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the explicit terms of Article III and the Eleventh Amendment. 440 U.S. at 421, 426. But the Court has since repudiated the majority's mode of interpretation and endorsed the dissenters', *see id.* at 430 (Blackmun, J., dissenting); *id.* at 433 (Rehnquist, J., dissenting). It has held that state sovereign immunity is *not* limited to the explicit terms of the constitutional text; rather, States "retain" their pre-ratification immunity "except as altered by the plan of the Convention." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999); *see also, e.g.*, *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 753-755 (2002).

The historical record leaves little doubt that, before ratification, States were understood to be immune from suit in each other's courts. FTB Br. 21-22. And the participants in the ratification debates, who disagreed on much else, agreed that the Constitution would not render States more vulnerable to suit than they were

before. *Id.* at 23-25. That consensus was confirmed by the backlash to *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793); the States that ratified the Eleventh Amendment surely did not mean to "foreclose[] the neutral federal forums only to be left to defend suits in the courts of other States." *Hall*, 440 U.S. at 437 (Rehnquist, J., dissenting); *see also id.* at 431 (Blackmun, J. dissenting); FTB Br. 26-28. And it is further confirmed by pre-*Hall* decisions. FTB Br. 28-30. Because the Convention did not "alter[]" States' pre-ratification immunity in other States' courts, States "retain" that immunity today. *Alden*, 527 U.S. at 713.

B. Hyatt's responses mischaracterize the FTB's brief and the relevant precedents.

1. Hyatt attempts (at 41) to cast doubt on the historical consensus that, before ratification, States were immune from suit in other States' courts. As the FTB's brief explains (at 21-22), that immunity is evident from such cases as *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), and *Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. 1781) (No. 9,697). Hyatt suggests (at 41) that those cases reflected "the unique context of admiralty law." But *Nathan* was not an admiralty case; it was brought in Pennsylvania's Court of Common Pleas rather than its Admiralty Court, and the property at issue was "a quantity of cloathing" rather than a ship. 1 U.S. at 77. And although both cases were in rem proceedings, neither this Court nor scholars have understood them as limited to that context. *See, e.g.*, *National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 358 (1955) (*Moitez* recognized "[t]he freedom of a foreign sovereign from being haled into court as a defendant"); Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Calif. L. Rev. 555, 585 (1994) (*Nathan* marked

"a decisive rejection of state suability in the courts of other states").[2]

Hyatt misreads the authorities on which he relies in disputing this historical consensus. He first quotes language (at 41) from what he says is Justice Cushing's opinion in *Chisholm*. The language is from Chief Justice Jay's opinion, not Justice Cushing's. More importantly, Chief Justice Jay did *not* suggest (as Hyatt claims) that before ratification States could be sued in other States' courts. To the contrary, his statement that "[e]ach State was obliged to acquiesce in the measure of justice which another State might yield to her, or to her citizens," 2 U.S. at 474, is more naturally read to mean that a State and its citizens—lacking access to a neutral federal forum—could sue another State only in the defendant State's *own* courts. *Id.* That is clear from the opinion's account of why the Framers extended federal jurisdiction "[t]o controversies between a State and citizens of another State"—namely to give States or their citizens a neutral forum in which to sue a different State, rather than limiting them to suit in the defendant State's courts. *See id.* at 475-476.

Hyatt next relies on an article for the proposition that, "out of the original thirteen colonies, only two directly opposed jurisdiction over state governments."

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[2] The context of *Nathan* and *Moitez* only strengthens their implication that States were regarded as immune from suit in other States' courts. A court's exercise of in rem jurisdiction over property owned by a State offends the State's dignity less than the exercise of in personam jurisdiction over the State or its officials. This Court has held, for example, that States cannot assert sovereign immunity in certain admiralty actions against vessels they claim to own. *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 501-508 (1998).

Br. 41 (citing Randall, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1, 55 (2002)). But the article claims only that by ratifying the Constitution, the States conceded they could be sued in *federal* court—not in another State's courts. *See* 81 Neb. L. Rev. at 54 ("The ratification documents of the majority of the states permit or compel the inference that the states understood that ... they ... were subject to suit by the terms of Article III, Section 2.").

2. Hyatt argues at length that even if States have a sovereignty interest in not being sued in other States' courts, they also have a sovereignty interest in adjudicating disputes that arise within their borders. He accuses the FTB (at 29, 33) of "ignor[ing]" or "fail[ing] to recognize" that interest. In fact, the FTB's brief recognizes (at 34) "that States have a sovereignty interest in hearing disputes that arise within their borders."

The brief goes on, however, to explain (at 34-36) that that interest must be reconciled with the States' countervailing interest in not being haled into other States' courts—and that when the two interests clash, the latter carries greater weight. That was true in the Founding era, when no one suggested that Pennsylvania's interest in adjudicating the ownership of property within its borders (in *Nathan* and *Moitez*) should trump Virginia's or South Carolina's right not to be haled into Pennsylvania's courts. *See* FTB Br. 21-22, 34. And it is true today, as demonstrated by the overwhelming number of States and state organizations that support overruling *Hall*. *See* Br. of Indiana and 43 Other States; Br. of Multistate Tax Comm'n, Nat'l Governors Ass'n, and Nat'l Conf. of State Legislatures.

Hyatt never explains why the States' interest in adjudicating disputes within their borders should pre-

vail when it clashes, as here, with the States' countervailing interest in not being haled into the courts of other States.[3]

3. Hyatt's next argument (at 41-42)—also articulated by Professors Baude and Sachs (at 8-11)—is that, by leaving untouched the States' pre-ratification immunity in the courts of other States, the Framers did not transform that immunity into a constitutional rule. Under that theory, interstate sovereign immunity remains a common-law rule that States may choose to abrogate. And, Hyatt argues (at 15-18, 44-45), because the Constitution does not forbid States from hearing suits against their counterparts, the Tenth Amendment preserves the power to do so.

But the Court has repeatedly described state sovereign immunity as constitutionally protected—including where it flows from structural principles rather than explicit constitutional text. *Alden*, for example, refers to the States' "constitutional immunity from suit," 527 U.S. at 727, and explains that "[a]lthough the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design," *id.* at 733. In *Federal Maritime Commission*, the Court likewise explained that by choosing not to "disturb States' immunity from private suits," the Framers "firmly enshrin[ed] this principle in our constitutional framework." 535 U.S. at 752. And other decisions describe state sover-

[3] Nor does Hyatt explain why, if the States' power to adjudicate all suits within their borders is so important, this Court has repeatedly held that power must yield to the common-law immunity possessed by Indian Tribes, *see* FTB Br. 41-42. He simply criticizes the Court's tribal sovereign immunity jurisprudence (at 46 n.5).

eign immunity in similar terms. *See, e.g.*, *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-268 (1997) (immunity is "implicit in the Constitution"); *Monaco* v. *Mississippi*, 292 U.S. 313, 322-323 (1934) (recognizing that "[b]ehind the words of the constitutional provisions are postulates which limit and control," including "that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention'" (footnote omitted)).

Hyatt and his amici claim that *Alden* held "'the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another[.]'" Hyatt Br. 42 (quoting 527 U.S. at 738) (emphasis omitted); *see* Br. of Professors of Federal Jurisdiction 11. But *Alden* held no such thing; that is simply *Alden*'s description of *Hall*'s holding. Nor does it help Hyatt that the *Alden* Court regarded *Hall* as "consistent with" its holding, 527 U.S. at 739; for the reasons discussed above, overruling *Hall* would be far more "consistent with" *Alden*.

In short, this Court's prior decisions make clear that the Constitution protects the immunities States previously enjoyed as a matter of common law.

4. Hyatt invokes *The Schooner Exchange* (at 38-39) for the proposition that sovereigns may choose whether or not to respect other sovereigns' immunity in their courts. But as the FTB's brief explains (at 30-33), the Court's holding in that case simply reflects the absence of a supranational tribunal that could require one nation's courts to respect the immunity of another. *The Schooner Exchange* has no bearing on *interstate*

sovereign immunity, which is why no court cited it as relevant to that issue in the 167 years before *Hall*.

Hyatt claims (at 17, 40-41) that, by recognizing the lack of a judicial enforcement mechanism for interstate sovereign immunity in the pre-ratification era, the FTB contradicts its argument that States were immune from suit in other States' courts during that era. But the two points are consistent. Before the Constitution, the relationship among States was like that among nations; no State could be ordered to respect another's immunity in its courts. But that did not mean States lacked immunity in other States' courts, only that they lacked a judicial means to enforce that immunity if the forum State's courts refused to respect it.[4] *See* FTB Br. 31-32. Indeed, "[t]reatises on the law of nations"—including Vattel's canonical work—"widely recognized sovereign immunity as a limit on the power of one sovereign to adjudicate claims against another." Pfander, 82 Calif. L. Rev. at 583-584 (citing Vattel). The fact that nations could elect to disregard that limit, and bear the diplomatic or martial consequences, did not mean the limit was illusory. *See, e.g.*, Bellia & Clark, *The Political Branches and the Law of Nations*, 85 Notre Dame L. Rev. 1795, 1804-1805 (2010) (*The Schooner Exchange* "insisted that the political branches—rather than the courts—make the decision to override the immunity").

Contrary to Hyatt's amici, Br. of Professors of Federal Jurisdiction 9, no one contends that creation of this Court *expanded* state sovereign immunity; it mere-

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[4] By the same token, constitutional rights are still rights even when they are not judicially enforceable. *See, e.g.*, Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

ly allowed judicial enforcement of the immunity States already possessed. Nor did it "displace pre-existing *state* authority over suits against other sovereigns," *id.* at 10, because—for the reasons discussed above and in the FTB's brief (at 21-22)—the States were understood to possess no such authority.[5]

Hyatt acknowledges (at 39) the FTB's argument that *The Schooner Exchange* reflects "'the absence of an enforcement mechanism'" among nations. But his response—that under the FTB's position, "[t]here would be no enforcement mechanism ... for those like Gilbert Hyatt who have been injured by another state government"—misses the point. The "enforcement mechanism" in question is a means for sovereigns to enforce their immunity against other sovereigns, not for a plaintiff to sue a sovereign.

Hyatt's references (at 17, 39) to a dissenting opinion in *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782 (2014), are equally unavailing. In the context of tribal sovereign immunity, that opinion recognized that "[s]overeign immunity is not a freestanding 'right' that applies of its own force when a sovereign faces suit in the courts of another." *Id.* at 816 (Thomas, J., dissenting). Here, however, the FTB does not invoke sov-

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[5] Amici are wrong in other respects as well. They suggest (at 12-16) that the only way in which this Court can vindicate one State's immunity in another's courts is by entertaining a State-vs.-State suit in its original jurisdiction. In fact, this Court can do so by reviewing state-court decisions, as in this case. And although amici claim (at 6-7) that overruling *Hall* would call into question the Court's foreign-sovereign-immunity precedents, that is incorrect; one nation's sovereign immunity in the courts of another would remain a matter of comity even if the Court were to recognize the irrelevance of *The Schooner Exchange* in the interstate context.

ereign immunity as "a freestanding 'right'" or argue that it "applies of its own force," *id.*; rather, the FTB argues that by ratifying the Constitution, the States agreed to let this Court enforce their sovereign immunity in each other's courts. The dissent's skepticism about the existence of a rule of "federal or state law" extending tribal sovereign immunity to federal or state courts, *id.* at 816-817, thus has no bearing here.

C. Hyatt also offers a handful of policy arguments. They are unpersuasive, and in any event of course would not justify disregarding the constitutional plan.

1. Hyatt's principal argument (at 31-32) is that, if *Hall* were overruled, a citizen of one State could not obtain relief when injured by another State. But anyone injured by a State may sue the State in its *own* courts. *Cf.* Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 290 ("refiling in the home state [is] a possibility in many cases" where one State refuses to entertain suit against another). States may choose not to waive their sovereign immunity against such suits, but that is equally true of suits brought by a State's own citizens. If *Hall* is overruled, the availability of suit against a State will be dictated by the State's *own* choices about waiving its sovereign immunity, rather than the choices of a *different* State.

Here, as the FTB's brief explains (at 39, 46), California has not generally waived sovereign immunity against claims "for or incidental to the assessment or collection of a tax," Cal. Gov't Code § 860.2. But it does allow two types of claims Hyatt could have pursued. Hyatt could have claimed the FTB had "recklessly disregard[ed]" its "published procedures," Cal. Rev. & Tax. Code § 21021(a), (b)(1), or violated the state informational privacy law, Cal. Civ. Code § 1798.45(c); *see*

Bates v. *Franchise Tax Bd.*, 21 Cal. Rptr. 3d 285, 295 (Ct. App. 2004) (§ 1798.45 allows suit notwithstanding § 860.2).

2. Relatedly, Hyatt argues (at 31) that the "political process" has "limits ... when a state harms those in other states." It is true that States lack the same political incentives to remedy harms against other States' citizens that they have to remedy harms against their own citizens. But the Constitution likely would not permit a State to allow its own citizens to sue for harms caused by the State while barring such suits by other States' citizens. *See, e.g.*, *McBurney* v. *Young*, 569 U.S. 221, 231 (2013) ("[T]he Privileges and Immunities Clause 'secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State.'").

As the FTB's brief explains (at 37-39, 44-45), it is *Hall* that creates perverse incentives and undermines the proper operation of the political process. *Hall* allows a State's sovereign conduct and public policy to be called into question by a different State's judges and juries—who may have quite different policy preferences, and who certainly have no incentive to consider the burden a financial sanction would impose on the defendant State's taxpayers.

3. Hyatt further argues (at 34-35) that States can protect themselves notwithstanding *Hall*. Those protections are illusory, however, for the reasons explained in the FTB's brief (at 48-49). Although the FTB eventually benefited from the Nevada Supreme Court's exercise of comity and from this Court's holding in *Hyatt II*, those decisions came only after the FTB was dragged through years' worth of litigation in

the Nevada courts, at extraordinary monetary and dignitary costs.

Sovereign immunity is an immunity *from suit*, not just a defense to liability; it cannot be vindicated by uncertain protections that may require years of litigation to invoke. *See, e.g., Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (immunity serves "'to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties'"). Nor should States have to attempt the complex process of negotiating an interstate compact, when the Constitution—the original interstate compact—grants them the protection they need.

4. Finally, Professors Baude and Sachs hypothesize (at 19-22) that a judgment rendered by one State against another might not be enforceable in the defendant State. But as *Hall* recognized, it is black-letter law that "[a] judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter." 440 U.S. at 421.

Amici do not argue that one State's disregard for another's sovereign immunity would constitute a defect in personal or subject-matter jurisdiction. They instead suggest (at 19-21) that this portion of *Hall* "could be revisited in an appropriate case," and that the validity of one State's judgment against another could be measured under a line of early-nineteenth-century cases in which courts applied principles "of common law and the law of nations" to determine the validity of other courts' judgments. Amici recognize that line of cases was superseded a century and a half ago by the Due Process Clause, *see* Br. 21 (citing *Pennoyer* v. *Neff*, 95

U.S. 714, 732-733 (1878)), but argue that it could be resurrected for States, which lack due process rights.

It is hard to imagine a better illustration of the need to overrule *Hall*. The notion that this Court should not worry about depriving States of a straightforward immunity in other States' courts—on the theory that they could seek to resurrect an archaic and amorphous common-law standard, which would provide at best uncertain protection and require years of litigation to define its contours—proves the need to restore the clear rule the Framers intended to preserve.

III. STARE DECISIS DOES NOT JUSTIFY MAINTAINING *HALL*

As the FTB's brief explains (at 39-49), stare decisis poses no barrier to overruling *Hall*.

A. Hyatt relies (at 36) on *Kimble* v. *Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), for the proposition that this Court does not "scrap[] settled precedent" simply because it "got something wrong," *id.* at 2409. But *Kimble*, like several other cases Hyatt invokes, involved the interpretation of a statute—and Hyatt fails to recognize that stare decisis has "special force in the area of statutory interpretation" because, "unlike in the context of constitutional interpretation, ... Congress remains free to alter" this Court's rulings. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989); *see also Kimble*, 135 S. Ct. at 2409.

In contrast, stare decisis "is at its weakest" for constitutional precedents, because—outside the possibility of a constitutional amendment—this Court alone can correct its prior errors. *Agostini*, 521 U.S. at 235. The Court "ha[s] held in several cases that *stare decisis* does not prevent [it] from overruling a previous deci-

sion where there has been a significant change in, or subsequent development of, [its] constitutional law" precedents. *Id.* at 235-236. And as the FTB's brief explains (at 40-43), this Court's later sovereign-immunity precedents have left *Hall* "behind as a mere survivor of obsolete constitutional thinking," *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992).

B. Hyatt argues (at 50-51) that litigants have made choices and incurred costs in reliance on *Hall*, but those are not relevant reliance interests. The precedents the Court is loath to overrule are those that have led people to alter their "primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998)—*i.e.*, those that "serve as a guide to lawful behavior," *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). Rules that affect only "the bringing of lawsuits" or other litigation behavior do not affect "the sort of primary conduct that is relevant." *Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion).

Under Hyatt's theory, reliance interests would always preclude the Court from overruling a precedent, because by the time a case arrives at this Court the parties will always have expended time and money litigating it under existing precedent. That is not the law.

C. Hyatt's attempts (at 49-50) to diminish the harms associated with suits under *Hall* are unpersuasive. As the FTB's brief (at 44-45) and the States' amicus brief (at 12-19) explain, *Hall* exposes States to exactly the kinds of monetary and dignitary burdens that sovereign immunity is intended to avoid. *See Alden*, 527 U.S. at 750; *Puerto Rico Aqueduct*, 506 U.S. at 146. Hyatt argues (at 49) that the large judgment in this case was reduced after multiple appeals and that some of the litigation costs arose from the FTB's choices, "in-

cluding ... three trips to this Court." But California should never have had to choose between paying a nearly half-billion-dollar judgment and incurring the enormous costs necessary to defend itself.[6]

Hyatt also has no response to the harms *Hall* poses to States' dignity interests when they are haled into another State's courts against their will, or to their self-government interests when another State's courts pass judgment on their public policy. *See* FTB Br. 45-48. The fact that courts regularly exercise jurisdiction over such cases undermines any suggestion that comity can mitigate *Hall*'s threat to state sovereignty.

D. Finally, Hyatt makes a last-ditch suggestion (at 51 n.6) that, if *Hall* is overruled, it should be overruled only prospectively. But the Court's "general practice is to apply the rule of law [it] announce[s] in a case to the parties before [it]," "even when [the Court] overrule[s] a case," *Agostini*, 521 U.S. at 237, and Hyatt presents no reason to depart from that practice.

Hyatt's reliance on *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), is unavailing, as that case was overruled (as relevant) by *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86, 97 (1993). *Harper* confirms that a new rule of federal law "must be given full retroactive effect in all cases still open on direct review." *Id.* Although Hyatt argues that his reliance on *Hall* warrants prospective-only application of any new rule announced here, the Court explained in *Harper* that it "can scarce-

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[6] As at the certiorari stage, Hyatt cites an article (at 33-34) for the proposition that litigation under *Hall* does not significantly burden States—and, again, he fails to disclose that the author was his retained expert. *See* Stempel, Hyatt v. Franchise Tax Board of California: *Perils of Undue Disputing Zeal and Undue Immunity for Government-Inflicted Injury*, 18 Nev. L.J. 61, 61 n.* (2017).

ly permit the substantive law to shift and spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Id.* (quotation marks and brackets omitted). There is no more reason to exempt Hyatt from a decision overruling *Hall* than in any case where the Court overturns precedent on which the litigants previously relied. Hyatt offers no basis to deny the FTB the protection of sovereign immunity.

CONCLUSION

The judgment of the Supreme Court of Nevada should be reversed.

Respectfully submitted.

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD
OF THE STATE OF
CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

JAMES W. BRADSHAW
PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
JAMES BARTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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